1028.

SUPREME COURT OF THE UNITED STATES.

No. 108.

SAMUEL SWARTWOUT, (U. S.) PLAINTIFF IN ERROR,

vs.

JOHN GIHON ET AL.

IN ERROR TO THE CIRCUIT COURT U. S. FOR THE SOUTHERN DIST. OF NEW YORK.

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UNITED STATES OF AMERICA, *ss:*

[L. S.] The President of the United States of America, to the judge of the circuit court of the United States for the southern district of New York, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between John Gihon, John Nicholson, and William Davison, plaintiffs, and Samuel Swartwout, defendant, a manifest error hath happened to the great damage of the said defendant, as by his complaint appears: we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, at the city of Washington, in the District of Columbia, together with this writ, so that you have the same at Washington on the second Monday of January next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this second Monday of January, in the year of our Lord one thousand eight hundred and forty-two, and of the independence of the United States the sixty-sixth.

J. W. METCALF,
Clerk of the Circuit Court of the United States for the southern district of New York, in the second circuit.

The answer of the honorable Smith Thompson and Samuel R. Betts, judges of the circuit court of the United States for the southern district of New York, to the within writ, containing the citation, record, and other proceedings in the cause.

Attest: J. W. METCALF, *Clk.*

[L. S.] By the honorable Samuel R. Betts, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit, to John Gihon, John Nicholson, and William Davison.

Whereas Samuel Swartwout lately issued out of the Supreme Court of the United States, at the city of Washington, District of Columbia, a writ of error directed to the judge of the circuit court of the United States for the southern district of New York, second circuit, stating that in the record and proceedings, as also in the rendition of the judgment of a plea in the said court before the judge thereof, be-

tween John Gihon, John Nicholson, and William Davison, *plaintiffs*, and Samuel Swartwout, *defendant*, a manifest error hath happened, to the great damage of the said defendant; and whereas, for the correction of that error in due manner, the said writ has been issued, returnable at the next stated Supreme Court of the United States, to be held in the District of Columbia, at the city of Washington, on the second Monday of January next: you are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the said second Monday of January next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of New York, in the southern district of New York, in the second circuit, the thirtieth day of December, in the year of our Lord one thousand eight hundred and forty-two, and of the independence of the United States the sixty-sixth.

SAM. R. BETTS.

We admit due service of the above citation.

VANDERPOOL & KANE,
Attorneys for John Gihon and others.

UNITED STATES OF AMERICA,
Southern district of New York, ss:

I, James W. Metcalf, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the writings annexed to this certificate are true copies of their respective originals on file, and remaining of record in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in [L. S.] the southern district of New York, this twentieth day of January, in the year of our Lord one thousand eight hundred and forty-three, and of the independence of the said United States the sixty-seventh.

J. W. METCALF, *Clk.*

Circuit court of the United States for the southern district of New York, in the second circuit.

Pleas before the judges of the circuit court of the United States for the southern district of New York, in the second circuit, at the City hall of the city of New York, of the first Monday of April, in the year of our Lord one thousand eight hundred and forty-two.

Witness Roger B. Taney, esquire, chief justice of the Supreme Court of the United States of America.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered, that on the first Monday of January, in the year of our Lord one thousand eight hundred and forty-two, before

the judges of the circuit court of the United States for [the] southern district of New York, comes Samuel Swartwout, by Ogden Hoffman, his attorney, and suggest to the said judges that John Gihon, John Nicholson, and William Davison, have commenced a suit against him in the superior court of the city of New York, in the State of New York, for acts done by him under the revenue laws, as collector of the district of the city of New York, and prays that the said suit may be docketed in the court as commenced here, and that the clerks be ordered to issue the proper process to remove the said suit, and all the proceedings therein, into this court. Whereupon the said judges sent unto the justices of the superior court a writ, *close* in these words:

The President of the United States, to the superior court of the city of New York, greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, should be certified of a certain cause commenced [L. S.] before you against Samuel Swartwout, defendant, at the suit of John Gihon, John Nicholson, and William Davison, plaintiffs, do therefore command you, that the record and proceedings in the said cause you distinctly and openly send to the said circuit court of the United States for the southern district of New York, in the second circuit, at the city of New York, on the
as fully and amply as the same are remaining before you, by whatsoever names the said parties may be called therein, together with this writ, that our court may cause to be further done thereupon what of right ought to be done.

Witness Roger B. Taney, esquire, chief justice of the United States, at the city of New York, the
in the year of our Lord one thousand eight hundred and forty-two.

To which the following return was made:

The answer of the justice of the superior court of the city of New York to the within writ mentioned.

The record of proceedings, whereof mention is within made, with all things touching the same, are hereby respectfully certified to the justices of the circuit court of the United States for the southern district of New York, within mentioned, as within it is commanded.

Witness Samuel Jones, esquire, chief justice of the superior court [L. S.] of the city of New York.

New York superior court, of December term, in the year of our Lord one thousand eight hundred and forty-one.

CITY AND COUNTY OF NEW YORK, *ss:*

John Gihon, John Nicholson, and Wm. Davison, plaintiffs in this suit, by Vanderpoel and Kane, their attorneys, bring into this court

and file with the clerk thereof, at his office, at the City hall, in the city of New York, their declaration, according to the form of the statute, against Samuel Swartwout, defendant, an inhabitant of the city and county of New York, and complains—

For that, whereas the said defendant, on the first day of November, in the year one thousand eight hundred and forty-one, at the city of New York, in the county of New York, was indebted to the said plaintiffs in the sum of thirty thousand dollars, lawful money of the United States of America, for so much money before that time lent and advanced by the said plaintiffs to the said defendant, and at the special instance and request of the said defendant; and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last above mentioned, when the said defendant should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, was indebted to the said plaintiff in the further sum of thirty thousand dollars, like lawful money as aforesaid, for so much money before that time paid, laid out, and expended by the said plaintiffs, to and for the use of the said defendant, and at the like special instance and request of the said defendant; and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last above mentioned, when the said defendant should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, was indebted to the plaintiffs in the further sum of thirty thousand dollars, like lawful money as aforesaid, for money before that time had and received by said defendant, to and for the use of the said plaintiffs; and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last above mentioned, when the said defendant should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before that time due and owing from the defendant to the said plaintiffs, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiffs in the further sum of thirty thousand dollars, like lawful money as aforesaid; and

being so found in arrear and indebted to the said plaintiffs, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last above mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant (although often requested, &c.) has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs; but to pay the same, or any part thereof, to the said plaintiffs *and the said defendant*, hath hitherto wholly refused, and still do refuse, to the damage of said plaintiffs of thirty thousand dollars, and whereof the said plaintiffs bring suit, &c.

And the said Samuel Swartwout, defendant in this suit, by Ogden Hoffman, his attorney, comes and defends the wrong and injury, when, &c., and says he did not undertake and promise in manner and form as the said plaintiffs in this suit have above thereof declared against the said defendant, and of this he puts himself upon the country and the said plaintiffs likewise, &c.

Therefore, to try the issue above joined, let the marshal thereupon summon a jury to come before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the City hall of the city of New York, on the first Monday of April, in the year of our Lord one thousand eight hundred and forty-two, twelve of whom, &c., each of whom, &c., neither of whom, &c., to recognise, &c., because as well, &c.; the same day is given to the parties aforesaid, at the same place.

And now, at this day, on the first Monday of April, in the year one thousand eight hundred and forty-two, before the said judges of the circuit court of the United States for the southern district of New York, in the second circuit, at the City hall of the city of New York, come the said plaintiffs, by their attorneys, as the within named defendant, by his attorney. And the jurors of the jury summoned to try the said issue, being called, also come, who, to speak the truth of the matters, being chosen, tried, and sworn, say, upon their oaths, that the said defendant did undertake and promise in manner and form as the said plaintiffs have complained against him, and they assess the damages of the said plaintiffs, by reason of the premises, over and above their costs *costs* and charges by them about their suit in this behalf expended, to eighteen thousand four hundred and eighty-four dollars, and for those costs and charges, six cents.

Therefore it is considered, that the said plaintiffs do recover against the said defendant their said damages, costs, and charges by the jurors aforesaid assessed, and also eleven hundred and seventy-six dollars and seventy-seven cents for their said costs and charges by the said court now here adjudged of increase, which

said damages, costs, and charges, in the whole, amount to nineteen thousand six hundred and sixty-one dollars and forty-three cents.

Judgment signed this nineteenth day of January, in the year 1843.

J. W. METCALF, *Clerk.*

Circuit court of the United States for the second circuit and southern district of New York.

JOHN GIHON, JOHN NICHOLSON, and WILLIAM DAVISON, vs. SAMUEL SWARTWOUT. } Bill of exceptions.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered, that afterwards, in the term of April, to wit, on the 23d day of April, in the year 1842, before the Hon. Smith Thompson, the aforesaid issue so joined between the parties as aforesaid came on to be tried by a jury of the said southern district, for that purpose duly empannelled, good and lawful men of the said county.

The plaintiffs then called Henry Coe, who, being sworn, testified that he was the plaintiffs' clerk in 1836, and attended to the custom-house business and to the entering of goods; that he has a statement at his house of goods that were entered and were duty free.

A bill of particulars of the plaintiffs' demand, in writing, furnished in pursuance of an order of the court, was here produced; and it was proved by this witness, that in the year 1836 the plaintiffs paid to the defendant, as collector of the port of New York, the sum of $\$12{,}986\frac{29}{100}$ for duties on brown linens. Of this amount, $\$5{,}107\frac{24}{100}$ were paid under protest in writing, served on the collector at the time of the respective entries. The remaining sum, $7,852 05, was paid without any written protest or notice.

In these cases where there was no written protest in writing, the plaintiffs told the defendant he should protest. It appears from the papers that the linens were entered free. The purposes allowed by Melancthon Swartwout to have them entered free was, that the plaintiff could recover the duties. There were many entries of these goods in which there was no protest, either in writing or verbal. The understanding was, that a certain entry and all future entries of the like goods should be considered under protest. The goods of which the samples are produced are free; all were passed by the appraisers as free, until orders were received from the Secretary of the Treasury to charge them as colored linens.

On being cross examined by the defendant's counsel, witness stated that the linens in question were originally entered as unbleached, and afterwards a new entry made out as colored. If, after the appraisement, they were passed colored, the entry was

changed; the entry was changed, because the appraisers passed them as colored linens. I know that all the duties were paid, because I paid them, except for a few weeks in summer, when I was out of town; *and* say as to the payment of duties when I was out of town. I can't swear that all the duties were paid while I was in town.

The general verbal protest extends to these. There is no evidence of a protest as to these, except the verbal one. I cannot identify these, so as to say that any protest on them was made.

Direct examination resumed.

Notice had been given to Mr. Swartwout that goods had been entered free for the purpose of bringing a suit. The notice as to future importations was made to the collector. The original entry was unbleached, and afterwards it was changed to colored. I do not know that these samples are the identical goods that were entered; they were always entered as unbleached goods, and always free since last trial.

Henry Ogden was then called, and testified that all the goods bonded by the plaintiffs were paid. That he was at the time cashier in the custom-house. The plaintiffs rested their case.

The counsel for the defendant then contended:

1st. That the notice of protest against payment of duties demanded by the collector must be in writing; that proof must be made that such notice was brought home to the collector; and that as no notice of writing had been served on the collector, against the payment of duties on the linens that were entered as colored, no recovery can be had of the duties paid on such goods.

The counsel for the plaintiffs contended, that the only object of notice was to warn the collector against paying over the money received for duties to the United States, and that such notice need not be in writing.

His honor the judge declared and delivered his opinion, that enough must be shown by the importer to establish that his objection came home to the collector. Notice to the deputy collector is substantially a notice to the collector. The jury must be satisfied that every one of these entries was made under objections. Prospective objections are improper. But here a large importation was made—some of the linens were colored. If they were all the same class of goods, and there was an understanding between the collector and importer that this protest should be prospective, the jury must judge if such understanding did exist, and if notice of protest was brought home to the collector. A verbal protest is sufficient if brought home to the collector.

The counsel for the defendant excepted to that part of the opinion in which the judge ruled that a verbal protest was sufficient.

Philo L. Mills was then called by the plaintiffs, and being sworn, testified, that he imported, in 1836, linens like the samples produced

and shown. They are brown linens—we always call them unbleached linens. I have heard of some process used abroad by which they are colored. Unbleached linen is made from flax. I think the difference in color is owing to rotting, which gives them a different complexion.

On being cross examined, the witness stated, that when linen of a particular color was in fashion, he did not know that they all rotted that color. There is no extraneous or coloring matter in these linens.

Henry W. Ogden was then called by the defendant, and being sworn, testified that he was cashier in the custom-house at the time of these importations. It was my duty to receive the duties when paid. All over two hundred dollars in amount were bonded. The credit given in these bonds were from six to nine months. The duties were paid at the expiration of the credit. Witness heard Mr. Gihon say, I am going to get that money back. Witness had nothing to do with the protest.

Henry Coe was then recalled by the plaintiffs, and testified that the appraisers would pass those that had a grass color as unbleached.

It was admitted that these linens were now passed at the custom-house as free.

The court charged the jury, that a written notice of the objections of the plaintiffs to pay the duties was not necessary. To this part of the charge, the counsel for the defendant excepted.

It was sufficient that a notice was brought home to the collector, but that the jury must be satisfied that notice was brought home to the collector.

To this charge, the attorney for the defendant excepted.

The said issue was then submitted to the jury, and they found a verdict for the plaintiffs of $18,484, and six cents costs.

And inasmuch as the said several matters so produced and given in evidence, and the matters insisted on by the said attorney of the defendant in his behalf, do not appear by the record of the verdict aforesaid, the said attorney for the defendant did then and there propose his aforesaid exceptions to the opinions of the said judge, and requested him to put his seal to this bill of exceptions, containing the said several matters so produced and given in evidence on the part of the said plaintiffs; and thereupon, the said judge, at the request of the said attorney for the defendant, did put his seal to this bill of exceptions, pursuant to the statute in such case made and provided, on the nineteenth day of December, in the year of our Lord one thousand eight hundred and forty-two.

O. HOFFMAN, *U. S. Attorney.*

Examined and consented to by plaintiffs' attorneys.

VANDERPOEL & KANE,
Plaintiffs' Attorneys.

O. HOFFMAN,
Defendant's Attorney.

O. HOFFMAN.